

No. 12662

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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JOSEPH DENUNZIO FRUIT COMPANY, a corporation,  
*Appellant and Cross-Appellee,*

*vs.*

RAYMOND M. CRANE, doing business as Associated Fruit  
Distributors,

*Appellee and Cross-Appellant,*

JOHN C. KAZANJIAN, doing business as Red Lion Pack-  
ing Company, a corporation,

*Appellee.*

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## PETITION FOR REHEARING.

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FILED

MAY - 9 1951

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## PETITION FOR REHEARING.

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*To the Honorable Judges of the United States Court of  
Appeals, for the Ninth Circuit:*

Raymond M. Crane, doing business as Associated Fruit Distributors of California, appellee and cross-appellant herein, hereby petitions for a rehearing of the above entitled matter after decision of this Court reversing the judgment of Judge James M. Carter, entered upon granting of a motion for a new trial interposed by said appellee.

The grounds upon which this petition is based are:

1. This Court erred in its application of the law to the facts of this case.

2. To consider the issues involved in the light of recent decisions of courts of last resort holding contracts entered into in violation of O. P. A. Regulations to be void and unenforceable.

3. The payment of a commission by Denunzio to Crane (Kazanjian's agent) was the same as paying the sale price and commission to Kazanjian.

4. To further consider the equities of this case.

Ever since the contention was advanced by appellant Denunzio before Judge O'Connor that Crane was the agent of appellee Kazanjian, we have steadfastly contended that the so-called agreement to pay a seller of merchandise and his agent a sum of money in excess of the ceiling established by O. P. A. under the Emergency Price Control Act was unlawful and void and could not be the basis of an action for damages for a breach of the so-called agreement against the seller or his agent. We use the words "so-called agreement" advisedly because it has always been our contention that the negotiations never resulted in an agreement. That question became immaterial because of Judge Carter's holding the agreement relied upon by appellant to be illegal.

### **This Court's Decision in the Case at Bar.**

In its opinion this Court reviews the proceedings before Judge O'Connor and Judge Carter and thereupon sets forth the conclusions of Judge Carter and the contentions of appellant as to error on the part of Judge Carter. This Court thereupon states: "The primary question presented

by this appeal has to do with the legality of the contract.” and with reference thereto stated: “Upon this record we are satisfied that Judge O’Connor’s findings of fact are supported by substantial evidence, and that his conclusions of law are supported by his findings of fact”.

Nowhere in this Court’s opinion has it set forth any reference to the provisions of the Emergency Price Control Act or the regulations adopted by the Office of Price Administration, nor has this Court referred to or quoted from any legal authorities or adjudicated cases as supporting the legality of the contract sued upon. We are at a loss to know just what provisions of the Emergency Price Control Act or regulations of the Office of Price Administration or decisions of courts of last resort this Court relies upon as a basis of sustaining the legality of the contract in question. We therefore feel that in this petition for rehearing it becomes necessary to briefly review the provisions of the Emergency Price Control Act and the regulations of the Office of Price Administration and refer to the authorities relied upon by both Denunzio and Crane.

### **The Contract Relied Upon by Denunzio.**

The contract relied upon by Denunzio was for the sale of three carloads of grapes at a price of \$2.50 per lug, plus a commission of \$50.00 a car to Crane.

The evidence showed that a carload of grapes contains from 775 boxes to 1170 boxes, with an average of 1100 boxes. This would make the per box commission to Crane run from \$.0645 a lug for a car containing 775 lugs to \$.0427 a lug for a car containing 1170 lugs. The average of 1100 lugs per car would make a per lug com-



mission of \$.0454. (See appellee Crane's brief, p. 15, *et seq.* and appendix.)

Judge Carter found the combined consideration to amount to approximately \$2.54 per lug.

### **The O. P. A. Ceiling.**

Crane contends that the ceiling at the time delivery was to be made was \$2.50 a box to the seller. (See Appellee Crane's Br. p. 3.)

Denunzio contends the ceiling at said time was \$2.53. (See Appellant Denunzio's Br. p. 12.)

The ceiling contended for by Denunzio was still below the price Denunzio was to pay to the seller and his agent.

### **Provisions of the Emergency Price Control Act and Office of Price Administration Regulations.**

The pertinent provisions of the Act and Regulations are set forth in Appellee Crane's brief commencing on page 19. Briefly they are as follows:

It is in the interests of national defense and security and necessary to the effective prosecution of the present war to "stabilize prices". (Sec. 901(a).)

The Administrator is empowered to establish maximum prices. (Sec. 902.)

It is "unlawful to buy or receive a commodity or do any act in violation of any regulation or order or price schedule or to offer to do so. (Sec. 904(a).)



Creates the Office of Price Administrator and authorizes him to issue Regulations and Orders. (Sec. 921(a)(d).)

Authorizes Administrator to apply to the courts to enjoin violations and authorizes injunctions, fines, imprisonment and confers criminal and civil jurisdiction on the District Court. (Sec. 925(a)(b)(c).)

Precludes damages and penalties when persons act in good faith. (Sec. 925(d).)

Authorizes purchasers to bring actions against sellers for overcharges and treble damages and authorizes Administrator to sue. (Sec. 925(e).)

The pertinent provisions of Maximum Price Regulation 426 are:

No person shall sell or deliver or buy or receive fresh fruits and vegetables at prices higher than the maximum prices established by this regulation or agree, offer or attempt to do any of these acts. (Sec. 7.)

Persons violating these regulations are subject to criminal penalties, civil enforcement action and suits for treble damages. (Sec. 9.)

Price limitations shall not be evaded by direct or indirect methods or by way of commissions or any other charge. (Sec. 11.)

It will thus be seen that a contract in violation of the Act and Regulations is "unlawful" and the Seller is subject to criminal penalties, injunction, repayment of overcharge or treble damages.

### The Effect of This Court's Decision.

The effect of this Court's decision is that a seller must go through with an "unlawful" contract and subject himself to criminal penalties, injunction, repayment of overcharges or treble damages, or in the event he still refuses to go through with the contract then to pay the buyer all profits or damages which the buyer would have made out of this "unlawful" contract. Certainly Congress never intended such to be the interpretation of the Acts and Regulations above summarized.

That such is not the rule is shown by the statement of the Court of Appeals of Alabama, 33 So. 2d 891, as follows:

"The fact that the purchaser is granted in a separate section a right to, and may, if he chooses, attempt to collect damages, where he is the victim of a sale involving over ceiling prices can in no way operate to validate a contract specifically declared unlawful by the act of prohibiting such contracts."  
(*Walker v. Bailey.*)

### The Case at Bar.

This is not an action to recover the contract price or reasonable value of merchandise sold and delivered at a price in excess of O. P. A. ceiling. It is an *action for damages* for breach of an alleged contract to sell merchandise at a price in excess of O. P. A. ceiling. The merchandise was never delivered. The contract price was never paid. The terms of the contract were never definitely agreed upon. The deposits which Denunzio was to make were never made.

The appellant is asserting an unlawful contract as the basis of his claimed right to recover damages and not to

recover for merchandise delivered and which Crane is keeping but refusing to pay for.

All equities should be *in favor* of a seller who has delivered merchandise to a purchaser, where the buyer retains the merchandise and refuses to pay for same, claiming the contract to be void because the contract price is in excess of ceiling.

All equities should be *against* a buyer who claims damages because the seller refuses to carry out an unlawful contract.

### **The Authorities Relied Upon by Appellant Denunzio.**

All of the cases relied upon by Denunzio are where the defendant had received a valuable consideration and seeks to avoid paying for same while still keeping the consideration.

Most of the cases cited by Denunzio as supporting his contention were analyzed in appellee Crane's brief commencing on page 28 and it was pointed out that none of said cases (other than *Miller v. Long Bell*) involved an O. P. A. violation and none of the cases authorized a recovery of damages for breach of an unlawful contract.

The case of *Miller v. Long Bell Lumber Co.* was an action to recover the reasonable value of merchandise sold and delivered and the Court deducted from the price charged the excess over the O. P. A. ceiling. The Court found the overcharge to be unintentional and governed by a provision of the Act which provides for a return of the overcharge under such circumstances. This case does not support the claim that damages can be recovered because defendant refused to do a prohibited act.

The case of *Bruce's Juices v. American Can Co.* relied upon by Denunzio cannot help him as this was an action to recover the purchase price of cans which defendant contended were billed in violation of the Robinson Patman Act. The Court allowed recovery for the cans received and retained by defendant.

In speaking of the case of *Bruce's Juices* case the U. S. Court of Appeals, 2nd Circuit, stated (*Vines v. General Outdoor Advertising Co.*, 171 F. 2d 487) that case "held that the buyer of goods from a seller, who is engaged in violating such a statute, may not keep the goods without paying the price. The theory was that the seller's unlawful enterprise did not forfeit his title to the goods and that, since the buyer got his own title from the seller, he was obliged to conform to the conditions imposed upon its transfer."

In the case of *Turner Glass Corp. v. Hartford Empire Co.*, U. S. Ct. of Appeals, 7th Circuit, 173 F. 2d 49, the Court cited the *Bruce's Juices* case as supporting "the proposition that the courts recognize the distinction between inherent and collateral illegality arising out of anti-trust violations \* \* \* But when the contract sued upon is not intrinsically illegal, the court has refused to allow property to be obtained under a contract of sale without enforcing the duty to pay for it because of violations of the Sherman Act not inhering in the particular contract in suit \* \* \*".

Clearly the *Bruce's Juices* case does not support the contention that damages may be recovered for refusal of defendant to carry out an unlawful contract.

## I.

### The Court Erred in Its Application of the Law to the Facts of This Case.

The Emergency Price Control Act makes it “unlawful” to violate price schedules or regulations.

The effect of entering into an “unlawful” agreement is to make the same void and unenforceable. The agreement being void it cannot be enforced in an action on the agreement and the reverse of this is also true—it cannot be the basis of a suit for damages where one party refuses to go through with the agreement.

Numerous cases are set forth in appellee Crane’s brief (pages 19 to 28) holding “unlawful” contracts to be void and unenforceable and that no action can be brought thereon to enforce the contract or to award damages for the breach thereof and more cases are cited under Sub. II hereof.

This Court erred in its application of the law to the facts of this case.

## II.

### Recent Cases Involving O. P. A. Ceiling.

In the case of *Hall v. Bucher* (decided Feb. 1950, Mo.) 227 S. W. 2d 96, plaintiff sought to recover money claimed to be due for corn delivered. It was agreed that the price of the corn should be the highest ceiling price during a certain period. At the date of the sale the ceiling price was \$1.08 a bushel and the purchaser paid this amount. During the period referred to in the contract the ceiling price rose to \$1.33 $\frac{1}{3}$  a bushel. This action was to recover the difference. Defendant contended that the provision of the contract for adjusting the price upward



was in violation of O. P. A. regulations. The Court held the contract for price adjustment to be void and denied recovery. The plaintiff contended that defendant induced him to enter into the contract and that therefore he could not plead illegality, but the Court rejected this contention stating "the law permits a party to an illegal agreement to set up the illegality as a defense even though it may be alleging his own turpitude."

In the case of *Dippel v. Brunozzi*, (decided June 1950) 365 Pa. 264, 74 Atl. 2d 112, the Supreme Court of Pennsylvania stated with reference to Sec. 904 of the Emergency Price Control Act:

"Therefore such a sale or such a purchase, during the time when the act was in effect, was against public policy and consequently unenforceable. This accords with the general rule that an agreement which violates a provision of a statute, or which cannot be performed without violation of such provision is illegal and void."

In the case of *Palmer v. Mayer*, (decided Feb. 1947) 330 Ill. App. 619, 71 N. E. 2d 822, the Court held where the purpose of a contract was to defeat the operation of the Emergency Price Control Act and regulations of the Office of Price Administration with reference to sugar and both parties to the contract knew that they were engaging in an unlawful undertaking, no recovery could be had for breach of the contract by one of the parties.

In the case of *International Spangles Corp. v. Marrow Mfg. Co.*, (decided May 1945) 294 N. Y. 295, 62 N. E. 2d 77, the Court of Appeals of the State of New York denied a recovery for merchandise sold and delivered where plaintiff failed to show it had established a maximum price for the merchandise in accordance with the

Emergency Price Control Act holding that plaintiffs demand for the price of the commodity delivered to the defendant is legally unenforceable, citing various New York cases to support said ruling.

In the case of *Perma-Stone Corp. v. Merkel*, 255 Wis. 565, (decided Nov. 1949) 39 N. W. 2d 730, plaintiff sought to foreclose a mechanic's lien for labor and materials furnished to defendant. Defendant contended the price charged was in excess of the O. P. A. ceiling. The Court denied foreclosure of the lien but awarded plaintiff damages against defendant for breach of contract. In reversing the judgment the Supreme Court of Wisconsin stated: "Plaintiff's violation of O. P. A. regulations pertaining to prices is a defense in a civil action to recover damages for breach of contract."

In Appellee Crane's brief (pp. 23 and 24) two cases are referred to which deny a recovery of damages against a seller where the contract violated O. P. A. regulations.

It will thus be seen that we have presented to this Court four cases of courts of last resort where claims for damages were denied where defendant refused to carry out a contract for sale at a price in excess of O. P. A. ceiling. We have also cited herein and in Appellee's brief many cases where the courts have held void contracts which violate O. P. A. ceilings.

As against this showing Denunzio has not cited one case where the court has awarded damages against a seller who refused to carry out a sale at a price in excess of O. P. A. ceilings.



III.

The Effect of the Agreement to Pay Crane a Commission.

The evidence showed that Crane was to get \$50.00 a car commission which, when divided by the average number of boxes in a car, amounted to 0.454 a box. The ceiling price that Kazanjian could charge was \$2.50 as contended for by Crane, or \$2.53 as contended for by Denunzio. Adding the price paid to Kazanjian to the commission to be paid to Crane brings the price in excess of the ceiling price regardless of whose contention is adopted as to the ceiling price.

Maximum Price Regulation 426, Sec. 11 provides that "the price limitations \* \* \* shall not be evaded by way of commission \* \* \* or any other charge \* \* \*".

The payment of the ceiling price to the seller and a commission to the seller's agent was in effect a payment of the total amount to the seller and the contract thereupon violated the price regulations.

In the case of *Fowler v. Equitable Trust Co.* 141 U. S. 385, 35 L. Ed. 786, the Court held that an agreement to pay the highest rate of interest under the law to a lender of money and the payment by the borrower to the lender's agent of a commission for making the loan constituted a payment to the lender in excess of the lawful rate and "rendered this loan usurious".

In the case of *Walker v. Bailey* (Ala.) 33 So. 2d 891 (referred to on p. 25 of appellee Crane's brief) the Court

held that the payment by the purchaser of a part of the purchase price to the seller and a part to his agent (both amounts when added together exceeding the O. P. A. ceiling) made the contract illegal and unenforceable.

In the case of *Blumenthal v. U. S.* 332 U. S. 539, 68 S. Ct. 248, 92 L. Ed. 154 (referred to on page 27 of appellee Crane's brief) the Court sustained a conviction for conspiracy to violate the Emergency Price Control Act in the sale of liquor where the seller was paid ceiling and his intermediaries received various sums of money for their part in the transaction.

The effect of this agreement to pay the seller the ceiling price and his agent a commission, voided the contract and made it unenforceable.

#### IV.

#### The Equities of This Case.

Crane was acting as an agent. He contended he was a procuring broker or agent of the buyer. Judge O'Connor held him to be the agent of the seller. He disclosed the name of the seller [Ex. 1-E; Tr. p. 33] before the so-called agreement was consummated.

The most that Crane could receive was \$150.00—the amount Denunzio was agreeing to pay him as a procuring broker. Under Judge O'Connor's decision Crane is ordered to pay damages, interest and attorney's fees in excess of \$9700.00. [Tr. p. 151.]

Certainly the equities of this case require a rehearing of this action.

### Conclusion.

We submit that a rehearing should be granted in this matter and the decision of Judge Carter should be affirmed.

Respectfully submitted,

HENRY O. WACKERBARTH,

*Attorney for Appellee and Cross-Appellant Crane, Doing  
Business as Associated Fruit Distributors.*

### Certificate of Counsel.

The undersigned, Henry O. Wackerbarth, attorney for Raymond M. Crane, doing business as Associated Fruit Distributors, appellee herein, does hereby certify that in his judgment the petition for rehearing is well founded and it is not interposed for delay.

HENRY O. WACKERBARTH.